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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

AMERICAN CONTRACTORS
INDEMNITY COMPANY,

Plaintiff and Respondent,

v.

DANNY G. BRYANT,

Defendant and Appellant.

B283733

(Los Angeles County
Super. Ct. No. BC582814)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Daniel S. Murphy, Judge. Affirmed.

Law Offices of Reneé Estelle Sanders, Reneé Estelle
Sanders and Travis M. Poteat for Defendant and Appellant.

Lanak & Hanna, Tracy A. Stevenson, Michael K. Murray
and Lauren B. Stec for Plaintiff and Respondent.

Following a bench trial the court found Danny G. Bryant liable to American Contractors Indemnity Company (ACI) under three separate bond applications/indemnity agreements. On appeal Bryant contends the court erred in admitting certain expert testimony and rejecting Bryant's statute of limitations defense. Bryant also argues the court's findings he signed the indemnity agreements and breached his obligations under them were not supported by substantial evidence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Bond Application and Indemnity Agreements

Before a court may issue letters of appointment to a prospective personal representative or conservator, the prospective representative or conservator must obtain, and the court must approve, a bond in an amount sufficient to protect the assets of the estate or of the conservatee in the event of any breach of duty by the representative or conservator. (Prob. Code, § 8480.) To that end, in 2005, 2006 and 2009 Bryant applied to ACI and obtained bonds in three separate probate matters: (1) in 2005, an administrative bond in the amount of \$200,000 in the estate of Notie L. Ward (L.A.S.C. case No. BP084051); (2) in 2006, an administrative bond in the amount of \$100,000 in the estate of Lexie Vernon Ashley (L.A.S.C. case No. BP095830); and (3) in 2009, a conservator bond in the amount of \$240,000 in the conservatorship of Willie L. Ashley, Jr. (L.A.S.C. case No. BP089790).

Each bond agreement provided the applicant would pay the annual bond premium and "indemnify and keep indemnified the Company [(ACI)] from and against any liability and all costs, charges, suits, damages, counsel fees and expenses of whatever

kind or nature which said Company shall at any time sustain or incur, for any reason, or in consequence of said Company having become surety or entering into such bond or bonds and agree[s] to place the Company in funds to meet any claim or demand before it shall be required to make payment.”

2. ACI's Lawsuit

In May 2015 ACI sued Bryant alleging he had breached each of the three indemnity agreements when he refused its demand for reimbursement for its attorney fees and expenses incurred in the Ward and Lexie Ashley surcharge actions and in avoiding a surcharge action in the conservatorship of Willie Ashley. ACI's complaint sought contract damages in the amount of \$11,082.45 under the Ward indemnity agreement; \$8,534.95 under the Lexie Ashley indemnity agreement; and \$14,895.35 under the Willie Ashley agreement, as well as additional amounts to be proved at trial.

3. The Evidence at Trial

a. ACI's vice-president Patty Lei Chen

Patty Lei Chen, the vice-president and bonds claims director at ACI, explained ACI's general business practices as a surety: ACI approves bond applications based on the bond principal's (the applicant's) credit and on the condition of the principal's execution of an indemnity agreement and payment of the bond premium. When ACI receives notice of a claim against the principal or information that there may be a potential claim, Chen will assign an ACI claims attorney to conduct a claims review to ascertain the potential risk to ACI and determine how to proceed to protect the company's interests. After that preliminary review, the company may hire outside counsel to protect its interests in the probate court matter.

In March 2011 Chen received notice that petitions had been filed to remove and surcharge Bryant as administrator in the Ward and Lexie Ashley probate matters. The Ward removal and surcharge petition alleged Bryant had sold real property in the Ward estate to Bryant's daughter in 2007, designating the property as "vacant land" when the property had structural improvements; it also alleged the proceeds of the sale had not been accounted for and, in fact, no accounting had been filed in nearly five years. The Lexie Ashley removal and surcharge petition alleged Bryant had done nothing in five years to close the estate and was delinquent in filing accountings. That petition also cited Bryant's alleged malfeasance as the conservator in the Willie Ashley conservatorship. In particular, the petition alleged Bryant had improperly charged rent to the conservatee despite the testamentary instructions of the estate of the conservatee's father that the conservatee live rent-free in his father's home. The Lexie Ashley petition also alleged that Bryant had established a revocable trust naming Bryant as trustee and Bryant's two sons as beneficiaries without court permission or approval.

After reviewing the petitions, Chen became concerned about ACI's potential liability under all three bonds. (Although no petition for surcharge had been filed in the Willie Ashley conservatorship, Chen testified she was convinced, based on the allegations in the Lexie Ashley petition for removal and surcharge, that such a claim was imminent.) After speaking to Danielle Ortiz, the assigned in-house claims attorney for ACI in April 2011, Chen hired outside counsel, Gary Burger, to represent ACI's interests in all three probate court matters. ACI

also wrote to Bryant and his attorney, Ollie Manago, reminding Bryant of his obligations under the indemnity agreement.

b. *Gary Burger's testimony*

Burger testified he became aware of the surcharge petitions on April 7, 2011 when ACI assigned the case to him. Burger met with Bryant and Manago that day following a hearing on Bryant's objections to one of the removal and surcharge petitions. Burger testified that he had explained to Bryant and Manago at the outset, both orally and in writing, that Bryant need not accept his advice or assistance. Burger's role was to represent the surety, ACI, not Bryant. If Bryant and Manago did not want his assistance, ACI would protect its interests in other ways, including but not limited to, formally intervening in the removal and surcharge matters.

Burger testified Bryant asked him at the meeting about the extent of his (Bryant's) obligations under ACI's indemnity agreement to reimburse ACI. Burger responded that Bryant would be responsible for Burger's fees and costs under the indemnity agreement; his hourly rate was \$250; and he would endeavor to keep his expenses to a minimum. According to Burger, Bryant and Manago welcomed his assistance. Manago later requested that Burger provide her with detailed billings and copy Bryant on all correspondence. Manago stated she planned to reimburse Burger for some work directly and the rest would be paid for by Bryant. Burger agreed to provide detailed billings to both Bryant and Manago but reminded Manago that ACI would pursue Bryant for indemnity under its indemnification agreements, not Manago.

Burger represented ACI in connection with all three matters from April 7, 2011 through October 10, 2012. Burger

testified that, as ACI's counsel, he was most concerned with the allegations in the petition that Bryant had not provided accountings in several years in any of the three matters. He immediately devised a strategy, agreed to by Bryant and Manago and petitioners' counsel, to consolidate all three cases before a single judge and then stipulate to the filing of the required accountings by a mutually agreeable date approved by the court. With all parties in agreement, the court issued a consolidation order and thereafter approved dates for the filing of accountings in all three matters.

Burger provided detailed testimony at trial to the work he performed to support his bills. Among other things, Burger testified he performed substantial work in preparing the required accountings, including correcting and frequently redoing Manago's work to make it conform to statutory requirements. Chen testified ACI paid Burger's bills and sought indemnification from Bryant in writing before filing its complaint.

c. *Bryant's testimony*

Bryant testified at trial that he did not need or want Burger's assistance in defending against the removal and surcharge petitions and told him that on April 7, 2011 when the two first met. Although the indemnity agreements bore his signatures, Bryant claimed the signatures were not his. He also testified he did not recall signing the indemnity agreements. Bryant explained he believed when he obtained the bonds that he would only be liable to ACI under the bond if he were, in fact, surcharged.

d. *Linda Mitchell's expert testimony*

Linda Mitchell, a forensic document examiner, testified as an expert witness for ACI. Mitchell examined several documents

with Bryant's signature that were not disputed and compared them to copies of the bond application indemnity agreements. Mitchell explained it was not uncommon for experts to rely on copies of documents rather than originals. Based on multiple factors, about which she testified in detail without objection, Mitchell opined that it was "virtually certain," a standard she stated was equivalent to more likely than not, the signature on the copies of the bond application/indemnity agreements was Bryant's.

4. The Parties' Theories at Trial

ACI argued Bryant had signed the indemnity agreements and was legally obligated to reimburse ACI for Burger's expenses, which ACI insisted it had proved were reasonably incurred in connection with all three bonds. Bryant, who had pleaded a statute of limitations defense in his answer to ACI's complaint, argued ACI's contract claim arose in April 2011 when it retained Burger and was barred by the four-year statute of limitations governing actions for breach of written contract. Alternatively, Bryant argued, Burger's interference in all three probate matters on ACI's behalf was unnecessary and unreasonable; he and his attorney had successfully defended the removal and surcharge actions without Burger's assistance; and Burger's assertions otherwise were, at best, mistaken and, at worst, false.

5. The Trial Court's Ruling

After taking the matter under submission, on May 16, 2017 the court issued a statement of decision in ACI's favor on its contract claims. The court rejected Bryant's statute of limitations defense and found Bryant had signed all three indemnity agreements. It also found Bryant and his attorney supported Burger's actions in all three cases and, in any event,

Burger's actions were reasonable to protect the surety's interests. The court also found Burger's hourly rate of \$250 an hour "extremely reasonable." The court stated, "[T]he cases concerning the Notie Ward Bond, the Lexie Ashley Bond and the Willie Ashley Bond would not have been resolved without the time and effort that attorney Burger took in resolving the issues."

The court entered judgment awarding ACI \$34,512.75 in total contract damages under the indemnity agreements,¹ plus \$17,857.84 in prejudgment interest and \$1,998.85 in costs, exclusive of attorney fees to be determined after a postjudgment motion.

DISCUSSION

1. *Bryant Has Forfeited His Challenge to the Admissibility of Mitchell's Testimony*

Bryant contends the court erred in admitting into evidence Mitchell's expert opinion because she relied on photocopies of the indemnity contracts to opine that Bryant had signed the agreements. Bryant did not object on this ground at trial. Accordingly, he has forfeited the contention on appeal. (Evid. Code, § 353; see *People v. Clark* (2016) 63 Cal.4th 522, 603 [failure to make timely and specific objection forfeits claim of evidentiary error on appeal]; *Seibert v. City of San Jose* (2016) 247 Cal.App.4th 1027, 1057-1058 ["[i]t is of course a familiar rule that a finding may not be challenged based on erroneously admitted evidence unless the record contains 'an objection to or a motion to exclude or to strike the evidence that was *timely made*

¹ The court found ACI incurred \$12,608.90 in legal expenses on the Ward bond, \$8,534.95 on the Lexie Ashley bond, and \$14,895.35 on the Willie Ashley bond.

and so stated as to make clear the *specific ground* of the objection or motion”].)

2. *Substantial Evidence Supports the Court’s Finding
Bryant Signed the Indemnity Agreements*

Bryant alternatively contends the court’s finding he signed the agreements was not supported by substantial evidence.² Citing *Spottiswood v. Weir* (1885) 66 Cal. 525 (*Spottiswood*), Bryant insists Mitchell’s opinion, which relied on photocopies of the indemnity agreements rather than the original documents, was insubstantial as a matter of law. (See *id.* at p. 529 [handwriting expert could not reasonably rely on genuineness of a disputed writing based on a “press copy”³ of that writing rather

² “[W]hen the findings of fact are challenged in a civil appeal, we are bound by the familiar principle that the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support the findings below. . . . In applying this standard of review, we view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor.” (*Multani v. Knight* (2018) 23 Cal.App.5th 837, 857, internal quotation marks and citations omitted; accord, *In re R.V.* (2015) 61 Cal.4th 181, 217; *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 798.)

³ The Supreme Court has described a “press copy” such as the one at issue in *Spottiswood* as a “copy of the original made on “tissue paper””: ‘after a letter has been written on ordinary paper, it is placed between the leaves of a book filled with this kind of paper, the pages upon which the copy is desired being usually dampened somewhat for that purpose, after which such book is subject to great pressure by means of a hand or other press. One or more impressions may thus be made of the written

than the original; any such opinion would be based on speculation and conjecture]; see generally *People v. Wright* (2016)

4 Cal.App.5th 537, 546 [expert opinion based on conjecture or material not reasonably relied on by experts is not “substantial evidence”].)

Bryant’s reliance on *Spottiswood*, a case decided 134 years ago and nearly 75 years before Xerox Corporation introduced the first push-button plain-paper photocopy machine,⁴ to argue that photocopies are not documents reasonably relied on by experts is misplaced. More recent Supreme Court authority has made clear that, for purposes of a handwriting comparison, a photocopy can suffice; it is up to the jury to consider the weight of the evidence. (See *People v. Lucas* (2014) 60 Cal.4th 153, 231 [distinguishing *Spottiswood* in part based on difference between press copies and photographic copies; evidence of any inaccuracy or uncertainty generated by comparing photocopy could be elicited through cross-examination of expert and considered by jury], disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19; cf. *People v. McKenna* (1938) 11 Cal.2d 327, 337-338 [photographic negative admissible for purposes of handwriting comparison].)

Mitchell testified that, although original documents are certainly preferable, forensic document examiners frequently conduct handwriting analyses based on photocopies rather than

matter upon the leaves of this tissue paper.” (*People v. Lucas* (2014) 60 Cal.4th 153, 231, fn. 34.)

⁴ See *A Brief History of the Photocopier Industry* <<https://www.photocopycopiers.net.au/copierchoice-resources/history-of-the-photocopier.html>> (as of May 14, 2019).

originals. After conducting comparative analysis of features between Bryant's distinctive signature and the signature on the indemnity agreements, Mitchell testified it was more likely than not that Bryant signed the indemnity agreements. The court credited that testimony. It also conducted its own review of the photocopies of the agreements admitted into evidence without objection and concluded "any lay person reviewing defendant Bryant's signature could easily ascertain that [the indemnity agreements] were signed by defendant Bryant." (See Evid. Code, § 1417 [expert testimony unnecessary when determination of genuineness of a handwriting, or lack thereof, can be made by trier of fact]; *People v. Rodriguez* (2005) 133 Cal.App.4th 545, 547 [trier of fact may compare signatures and, based on that comparison, determine without benefit of handwriting expert whether signatures were made by defendant].) The court found ACI had carried its burden to prove by a preponderance of the evidence that Bryant signed the indemnity agreements. Substantial evidence supports that finding.

3. *Substantial Evidence Supports the Trial Court's Finding Bryant Breached the Indemnity Agreements*

Bryant contends ACI failed to establish he received its written demand for payment, which he claims was an essential element of ACI's contract claim. Although ACI introduced evidence it had sent Bryant and his attorney written demands for payment, he insists the certified mail receipt was not properly authenticated. Bryant failed to object to the evidence at trial and has forfeited that argument. (*People v. Clark, supra*, 63 Cal.4th at p. 603.) His contention is also without merit. The contract contains no requirement that ACI send Bryant a written demand for payment. (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 633 [when a party's duty to indemnify is

contractual in nature, the scope of the indemnification duty is governed by the terms of the contract]; *Valley Crest Landscape Development, Inc. v. Mission Pools of Escondido, Inc.* (2015) 238 Cal.App.4th 468, 479 [same]; see generally *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 288 [parties' contractual intent is determined by reference to the language of the agreement].) Even if such a requirement could be reasonably inferred, Chen testified without objection that ACI had sent Bryant several written demands.

4. *The Court Did Not Err in Awarding Indemnification for Burger's Expenses Under the Willie Ashley Bond*

Bryant contends the court abused its discretion in awarding damages under the Willie Ashley bond's indemnity agreement because no removal or surcharge petition had been filed against Bryant in that action. At the threshold, both parties misstate the standard of review. Although we review the amount of an attorney fee award for abuse of discretion (see *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751), when, as here, appellant's challenge is not to the amount of the award but to the legal obligation to pay it, the question is a matter of contract interpretation we review de novo. (*Ibid.*; see *Khan v. Shim* (2016) 7 Cal.App.5th 49, 55 [absent conflicting extrinsic evidence, interpretation of contractual right to fees is a question of law subject to de novo review].)

The terms of the three identical indemnity agreements are broad: The bondholder, Bryant, agreed to reimburse ACI for all expenses of "whatever kind or nature," including attorney fees, which ACI "shall at any time sustain or incur, for any reason, or in consequence of [ACI] having become surety or entering into such bond or bonds" The agreement does not provide a

surcharge petition must be filed for the surety to have the right to act to protect its interests. Although Bryant asserts, in conclusory fashion, that Burger's unwanted interference in the Willie Ashley conservatorship absent a surcharge petition was unreasonable as a matter of law, he cites no statute or provision in the indemnity agreements precluding the surety's involvement prior to the filing of a surcharge petition. Rather, he argues there is not "a scintilla" of evidence that Burger's efforts protected ACI's interests. However, both Burger and Chen testified Burger provided substantial assistance to Bryant to avert what would otherwise have been a successful surcharge petition; the trial court found their testimony credible; and their testimony constitutes substantial evidence supporting the court's finding. Simply stated, Bryant has not demonstrated error. (*Jameson v. Desta* (2018) 5 Cal.5th 594 608-609 [it is appellant's burden on appeal to demonstrate both error and prejudice]; *Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 798 [same].)

5. *Substantial Evidence Supports the Court's Finding ACI's Claim Was Timely*

Bryant insists ACI's action accrued in April 2011 when it first retained Burger. Because ACI did not file its action until May 22, 2015, more than four years after it had hired Burger, Bryant argues the action is time-barred under the four-year limitations period governing written agreements. (See Code Civ. Proc., § 337, subd. (a).) This argument, too, is without merit. "[T]he defendant's indemnity action does not accrue until he has suffered actual loss through payment." (*Valley Circle Estates v. VTN Consolidated, Inc.* (1983) 33 Cal.3d 604, 611; accord, *Valley Crest Landscape Development, Inc. v. Mission Pools of Escondido*,

Inc., supra, 238 Cal.App.4th at p. 481 [“[a] cause of action for breach of an express indemnity agreement (contractual indemnity) accrues when the indemnitor sustains the loss by paying the money sought to be indemnified from the indemnitee”].) The evidence at trial was undisputed that ACI made its first payment to Burger on June 29, 2011. Because ACI filed its action for breach of contract on May 22, 2015, within the four-year limitations period governing written contracts, ACI’s action seeking indemnity for that payment, and all subsequent payments relating to the bond applications, was timely.

DISPOSITION

The judgment is affirmed. Bryant is to pay ACI’s costs on appeal.

PERLUSS, P. J.

We concur:

FEUER, J.

STONE, J.^{*}

^{*} Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.